No. 21,953

United States Court of Appeals

For the Ninth Circuit

STANDARD OIL COMPANY OF CALIFORNIA,
WESTERN OPERATIONS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

There is little dispute as to the basic legal principles which govern this case. The Board states, "[w]here * * * information requested [by a union from an employer] is not so obviously pertinent to the subject matter of collective bargaining or to the bargaining process itself, so that relevance can be presumed, the union must demonstrate that the intelligence for which it has asked" relates to collective bargaining (Resp.Br., pp. 15-16). And the Board freely concedes that the employee address list here requested "does not directly relate to a particular subject of bargaining, nor to a specific dispute arising during the terms of and under a contract" (Resp.Br., p. 17).

The undisputed evidence shows (1) that at no time did the Union indicate to the employer that the list of home addresses was necessary to enable it to bargain intelligently or to administer the collective bargaining agreement and (2) that the Union's sole stated purpose for

requesting the information was to enable it to make a mass mailing to employees to counter what it believed to be employer "propaganda." The Board, however, seeks to establish an erroneous inference that the Union requested the address list for collective bargaining purposes. Such an inference is contrary to the record, the findings of the trial examiner, and the findings of the panel of the Board itself.

The Board also attempts to justify its decision on the grounds that the address list would facilitate union "access" to employees and would contribute to the "strength" and "effectiveness" of the Union. Such post hoc rationalizations are plainly inadequate when the undisputed evidence shows that the list was not requested for collective bargaining purposes. Moreover, the rationalizations now offered by the Board are legally insufficient to support a finding of an employer violation of the duty to bargain in good faith under section 8(a)(5). The duty to bargain in good faith with a union does not impose upon an employer the obligation to do acts the purpose of which is merely to strengthen the union.

I. THE UNION DID NOT REQUEST THE ADDRESS LIST FOR BARGAINING PURPOSES.

In its decision below, the panel of the Board erroneously held (R. Vol. I, p. 33) that, so long as the General Counsel's complaint contained an allegation that the information was relevant to collective bargaining, a violation of the duty to bargain in good faith could be found even though the Union did not tell the employer that the

information was requested for collective bargaining purposes (see discussion in our opening brief at p. 16). Significantly, the Board's brief abandons this position. Instead, the Board now attempts to raise an inference that the Union actually did request the address list in connection with collective bargaining (see Resp.Br., pp. 22-23). The trial examiner, however, expressly found that "[t]here is not a shred of evidence that the Company in this case was presented with a request for information which the Union indicated it needed for bargaining purposes" (R. Vol. I, p. 18). And, the panel of the Board did not disagree with this finding (ibid., pp. 28, 33).

In addition, the Board's effort is entirely without support in the record. The Union here was frank to state the purpose of its requests for the list of employee home addresses, and it did not suggest, prior to the hearing, that the list was requested for any purpose connected with collective bargaining. The uncontradicted evidence shows that the Union's requests were made solely to enable the Union to "counter the company propaganda" (General Counsel's Exh. 3) and to send employees "counter documentation and statements" (General Counsel's Exh. 7; and see discussion in our opening brief at pp. 14-16). And, when a bargaining situation did arise, the Union neither said nor did anything to indicate that it needed the home addresses for bargaining purposes (see discussion in our opening brief at pp. 15-16). The suggestion (Resp.Br., p. 12, ftn. 8) that no request was made because it would have been futile finds no support either in the findings of the trial examiner or in the opinion of the panel of the Board (see R. Vol. I, pp. 16-18; 32-33).

The Board's assertion (Resp.Br., p. 23) that "[t]he charges" filed by the Union specified the relevancy of the list is without foundation. The first charge (R. Vol. I, pp. 3-4) made no reference whatever to any alleged need for the list in order to bargain more effectively.[1] The amended charge (filed one day before the complaint) added an allegation that failure to supply the list was a refusal to bargain in good faith (R. Vol. I, p. 5). The first and only assertion that the list "constitutes information relevant to collective bargaining and the administration of the current collective bargaining contract" is contained in the General Counsel's complaint (R. Vol. I, p. 8). This conclusory allegation sheds no light on how home addresses were relevant.

It is therefore undisputed that the Company was never asked by the Union for bargaining information; it was asked only for an employee mailing list so that the Union could send out a mass mailing to the employees advertising its own views. These facts leave no room for doubt that the trial examiner correctly recommended that the complaint, based solely on alleged refusal to bargain in good faith, should be dismissed.

The Board also attempts to establish a relation between the request and collective bargaining on the basis of testimony brought forth at the hearing. That testimony is summarized in the Board's brief (at pp. 23-24) and, in effect, recites the Union's asserted need to "com-

[1]The only mention of bargaining in the first charge, which was based solely on the desire of the Union to "counter Company propaganda," was the assertion that the list was needed "so that the Union can respond to the Company's position in the mailing" (R. Vol. I, p. 4).

municate'' its views to the employees and to ''strengthen'' itself through continued organizational efforts. As is shown below (infra, pp. 5-10), these asserted purposes are legally insufficient.

II. THE BOARD'S POST HOC ATTEMPTS TO ESTABLISH RELEVANCY OF THE LIST TO COLLECTIVE BARGAINING ARE LEGALLY INSUFFICIENT.

As demonstrated above and in our opening brief (pp. 11-16), the undisputed evidence shows that the Union never requested the address list in connection with collective bargaining or for collective bargaining purposes.

The Board asserts (Resp.Br., pp. 17-27) that the list was in fact relevant to collective bargaining for reasons which were not advanced by the Union at the time it requested the list. We respectfully submit that an employer's obligation to bargain in good faith can be measured only by the request and stated reasons presented to him—not by the post hoc rationalizations of the Board. Moreover, the rationalizations offered by the Board are legally insufficient.

A. Relevancy to collective bargaining is not established by the claim that requested information would facilitate union ''access'' to employees.

As pointed out in our opening brief (p. 12), information which must be supplied by an employer in the discharge of his duty to bargain in good faith is that information in the employer's possession which is needed by the union to enable it to intelligently discuss the issues between the negotiating parties or to determine whether

the collective bargaining agreement has been violated. It is plain that an address list does not relate directly to collective bargaining. Indeed, the Board frankly admits that the list "does not directly relate to a particular subject of bargaining, nor to a specific dispute arising during the terms of and under a contract" (Resp.Br., p. 17). In such a case, as the Board acknowledges, "the union must demonstrate that the intelligence for which it has asked" relates to bargaining (Resp.Br., p. 16).

In spite of these admissions, the Board asserts (ibid., p. 19) that the address list would facilitate union "access" to employees and that *for that reason* the Company was obligated to supply it to the Union. The Board thus erroneously seeks to expand the duty to bargain in good faith under section 8(a)(5). Instead of requiring an employer to supply information which would enable a union *to bargain* intelligently, the Board would create a broad new rule that an employer must supply any and all information which may be generally helpful to a union. There is, however, no basis in law for the Board's suggested new rule.

The Union must, as the Board admits (ibid., p. 16), establish the relevancy of information requested to the bargaining process. This requirement is clear in the two cases, relied upon by the Board, which enforce an employer's duty to bargain in good faith. In *Fafnir Bearing Company v. N. L. R. B.* (1966) 362 F.2d 716, 718-721 (Resp.Br., p. 19), the union established that time study data was necessary for intelligent processing of grievances and the court therefore allowed a union expert to make such studies within the employer's plant. Similarly,

in *Kenai Packers* (1963) 144 NLRB 1122 (Resp.Br., p. 21), the contract contained a union shop provision (144 NLRB 1124-1125) and therefore a list of employee names and addresses obviously was necessary in order to assure that the employer was abiding by the contract (144 NLRB 1128).[2]

The error of the Board's present position is shown by its reliance upon cases which enforce statutory provisions other than the employer's duty to bargain in good faith under section 8(a)(5). The Board attempts to support its main argument with cases (Resp.Br., p. 20)—none of which was cited in the opinion below—which deal solely with protection of employee organizational rights under section 7 of the Act.[3] Not one deals with the employer's duty to bargain in good faith under section 8(a)(5). Similarly, *Excelsior Underwear Inc.* (1966) 156 NLRB 1236, 1246 (relied upon generally by the Board at pp. 26-27), deals with the Board's mandate to assure "the

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[2]The Board erroneously seeks (Resp.Br., p. 21, ftn. 13) to distinguish its decision in *McCulloch Corporation* (1961) 132 NLRB 201. In that case, the Board correctly noted that an address list was "not essential to bargaining" and concluded that there is

> "* * * no obligation on the part of an employer to release information to the bargaining union merely because it is available and is requested. A reasonable ground for making the request and necessity for the information must be shown" (132 NLRB 209-210).

[3]Those cases are: *Labor Board v. Babcock & Wilcox Co.* (1956) 351 U.S. 105; *Republic Aviation Corp. v. Board* (1945) 324 U.S. 793; *N. L. R. B. v. S & H Grossinger's Inc.* (2 Cir. 1967) 372 F.2d 26; *National Labor Rel. Bd. v. Lake Superior Lumber Corp.* (6 Cir. 1948) 167 F.2d 147; *Richfield Oil Corp. v. National Labor Relations Board* (9 Cir. 1944) 143 F.2d 860; and *National Labor R. Board v. Cities Service Oil Co.* (2 Cir. 1941) 122 F.2d 149.

fair and free choice of bargaining representative by employees'' in Board-conducted representation elections under section 9 of the Act. In that decision, the Board itself contrasted the issue before it in an election case ''with the substantially different issue of whether the employers' conduct violated'' section 8 of the Act (156 NLRB 1246).

The critical fact remains that the Union at no time requested the employee address list for collective bargaining purposes. In the absence of such a request, the Company plainly had no duty to supply the list.

B. An employer has no obligation to supply information in order to increase a union's ''strength'' and its ''effectiveness.''

The Board asserts that ''the quoted objective [to 'counter the company propaganda'] would suffice * * * even had it stood alone'' (Resp.Br., p. 22). The basis for this assertion is the statement that the list would assist the Union in gaining ''strength'' and ''effectiveness'' (Resp.Br., pp. 25-26). However, as pointed out in our opening brief (pp. 16-18), such a rationalization can not justify a holding that an employer ''refused to bargain in good faith'' by refusing to provide information for this purpose alone.

It is obvious that certain information which an employer could supply to a union might be helpful to the union. However, a union is not entitled to that information simply *because* it may be helpful. Rather, as the Board acknowledges (Resp.Br., pp. 14-17), a union must establish the relevancy of the information to collective

bargaining. In the absence of evidence that the particular information was sought in order to enable a union *to bargain* intelligently, there can be no violation of section 8(a)(5). The Board does not show that there is any such evidence in this case, and there is none.

It is perhaps because of this absence of evidence that the Board seeks to shift the burden to the employer to show a "legitimate interest" in withholding information which would contribute to the "strength" and "effectiveness" of a union (see Resp.Br., pp. 13, 26). Such a shift in the applicable burden of proof is plainly contrary to the governing legal principles which are recognized by the Board itself (Resp.Br., pp. 14-17). In this regard, the Board curiously makes much of the established Company policy not to release the home addresses of its employees (see Resp.Br., pp. 22, 27). However, the intimation (Resp.Br., p. 27) that the Company refused to supply the list solely because of its established policy without regard to its other legal obligations has no support in the record, in the findings of the trial examiner, or in the findings of the panel of the Board itself. And, in its brief, the Board four times acknowledges that the request was refused on the grounds that neither "law nor contract" obligated the Company to supply the list (Resp.Br., pp. 10-11, 22).

Moreover, contrary to the Board's suggestions (R. Vol. I, p. 33; Resp.Br., pp. 22, 27), we have not argued, and we do not now argue, that an employer could not be required, in a proper case, to furnish a union with employee home addresses if requested in connection with and demonstrated to be relevant and necessary to meaningful

collective bargaining concerning wages, hours and working conditions.[4] That question, however, is not presented in this case.

In the absence of a statutorily imposed duty to supply information, an employer plainly is not required to do so. And, as pointed out in our opening brief (pp. 16-18), the supplying of such information in the absence of a statutory duty would probably be a violation of section 8(a)(2) of the Act. As the Board acknowledges, such a list would contribute to the strength of the Union. The Board refers to what it characterizes as our "curious construction" of section 8(a)(2) (Resp.Br., p. 27). In turn, we can only refer this Court directly to the language of that section which plainly makes it unlawful for an employer to "contribute financial or other support" to any labor organization (Labor Management Relations Act, 61 Stats. 136, 141, 29 U.S.C. 158(a)(2)). The Board simply misses the point when it asserts that our position would result in the disappearance of "much of the duty imposed by Sections 8(d) and 8(a)(5)" (Resp.Br., p. 27). The point is that, absent a contractual or statutory duty, an employer cannot be required to—and indeed is not permitted to—supply support to a union which will strengthen its position.

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[4]The Board's dissenting member (R. Vol. I, p. 39) and the trial examiner (R. Vol. I, pp. 17-18) expressly took note of this position in their opinions.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should set aside the Board's order.

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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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